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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

RENO DIVISION

CG TECHNOLOGY DEVELOPMENT, LLC,

Plaintiff,

v.

ZYNGA, INC.,

Defendant.

Case No. 2:16-cv-00859-RCJ-VCF

ZYNGA INC.'S MOTION TO DISMISS FIRST AMENDED COMPLAINT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

In its orders granting motions to dismiss Plaintiff's claims regarding the '818 patent, this Court expressly held that if Plaintiff was to properly amend its complaint, it needed to provide ***specific allegations*** identifying a ***non-generic actual physical device or component*** a defendant has allegedly offered for sale, sold, made, used or imported. In its First Amended Complaint ("FAC"), Plaintiff ignores these instructions and reasserts infringement of the '818 patent with minor, non-substantive modifications. Plaintiff's FAC should be dismissed in its entirety.

First, Plaintiff's allegations in the FAC remove any doubt that the claims of the '818 patent are directed to the abstract concept of authorizing access to a game based on age. The patent should be therefore invalidated for failing to satisfy 35 U.S.C. § 101. When the Court previously addressed the '818 patent's validity per Section 101 (in the context of another defendant's motion), the Court took Plaintiff at its word when it stated the claims of the '818 patent are not directed simply to authorizing access to a game based on age but instead to carrying out that purpose by using "an arrangement of particularized computer components to implement" the claimed apparatus. Pls.' Opp'n at 12, *CG Tech. Dev., LLC v. Big Fish Games, Inc.*, No. 2:16-cv-00857-RCJ-VCF (D. Nev. July 25, 2016), ECF No. 33 ("Big Fish Opp'n"); *CG Tech. Dev., LLC v. Big Fish Games, Inc.*, No. 2:16-cv-00857-RCJ, 2016 WL 4521682, at *10 (D. Nev. Aug. 29, 2016) ("Big Fish Order"). The FAC dispels this claim. Rather than alleging a specific arrangement of particularized components allowing a user to play a game using a wireless controller, Plaintiff's infringement theory is so sweeping that ***any*** computing device capable of wireless transmission is the purportedly innovative wireless controller. Indeed, Plaintiff's identification of the revolutionary controller is: "mobile phones, tablets, and laptops that include wireless transmitters." FAC ¶ 21, ECF No. 64; ECF No. 64-3 at 25. In other words, the controller is a portable computer operating as intended. This leaves the claims of the '818 patent, as Plaintiff actually applies them to Zynga's accused social gaming applications, as directed to nothing more than age verification implemented on generic off-the-shelf hardware. This is precisely the type of incommensurate preemption that the Supreme Court and the Federal Circuit have warned against when applying Section 101.

Second, even if the claims are deemed eligible, Plaintiff has failed to meet the pleading requirements of the Supreme Court's holdings in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 550 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). For example, Claim 20 of the '818 patent (the only claim for which Plaintiff provides specific allegations of infringement) expressly requires authorization for the game by a specific processor through the use of an identification code. But the only factual allegation in support is Zynga's terms of service, which requires confirmation that a user is at least 13 year of age. This is a far cry from the actual, specific requirements of the claim, and therefore does not meet the plausibility standards of *Iqbal* and *Twombly*. Plaintiff's allegations of indirect and willful infringement are similarly vague, and Plaintiff's FAC therefore should be dismissed in its entirety.

In light of Plaintiff's implicit acknowledgement that the claims of the '818 patent are drawn only to the abstract concept of authorizing access to a game based on age, implemented on entirely generic off-the-shelf hardware, and Plaintiff's failure to identify plausible allegations regarding Zynga's supposed infringement of the'818 patent, Zynga requests that the Court find that the claims of the '818 patent are drawn towards an abstract idea and dismiss Plaintiff's FAC in its entirety.

II. ARGUMENT

A. The Claims of the '818 Patent Are Drawn to Unpatentable Subject Matter

This Court has found unpatentable every patent asserted against Zynga except the only one in Plaintiff's complaint: the '818 patent. For the five invalidated patents, the Court found that each embodied an abstract idea and provided no inventive concept beyond that abstract idea. The '818, entitled "Personalized Wireless Video Game System," relates to "wireless control of a video game system" such that the "video game [has] the ability to 'recognize' a user and adjust game operation accordingly." ECF No. 64-2 ('818 patent) at 1:10–12; *id.* at 1:20–24. It claims and describes a wireless game controller that stores personal information such as age, and, unlike wired controllers, provides the "user freedom to operate." *Id.* at 3:14–22; *see also id.* at figs.1 & 2; *id.* at 3:35–48.

In finding the '818 patentable, this Court held that the patent was "not directed simply to authorizing access based on age but carrying on that purpose by using 'an arrangement of *particularized computer components* . . .'" with "'physical and tangible components . . . ." Big Fish Order at *10. And this was precisely the argument Plaintiff made in arguing validity of the '818. Big Fish Opp'n at 12. In other words, the only thing that saved this patent from invalidity was a *particularized* arrangement of *physical and tangible* components (such as a remote video game controller)—as opposed to general purpose computing hardware.

However, and critically, this holding came very early in this litigation, in a separate case entirely, and before Zynga had the benefit of Plaintiff's infringement theory. As shown in detail below, Plaintiff's infringement theory—revealed for the first time in the complaint filed two weeks ago—does not point to a single particularized arrangement of any physical or tangible components. To the contrary, the FAC makes expressly clear that Plaintiff relies exclusively on general purpose hardware for any theory of infringement. Under Supreme Court law, and with the clarity of Plaintiff's infringement theory, the patent should now be found invalid.

1. *Alice* and 101 law.

As the Court has recently received extensive briefing related to Section 101, Zynga provides only a brief summary of the applicable legal standards here. The Supreme Court has prescribed a two-step approach for resolving whether a claim is drawn to subject matter that falls outside the scope of Section 101. *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 134 S. Ct. 2347, 2355 (2014); *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 132 S. Ct. 1289, 1294–98 (2012). The first step is to determine whether the claim at issue is directed to a "patent-ineligible concept" such as an abstract idea. *Alice*, 134 S. Ct. at 2355. If it is, the second step is to identify "what else" is claimed in order to determine whether the claim describes an "inventive concept" that is "significantly more" than the abstract idea and sufficient to "transform" the nature of the claim. *Id.* If it does not, the claim is ineligible under Section 101 and therefore invalid.

If a patent claim includes an abstract idea, the necessary inventive concept cannot simply be the implementation of the idea using standard, off-the-shelf computer technology. *Id.* at 2352 ("[M]erely requiring generic computer implementation fails to transform that abstract idea into a patent-eligible invention."); *id.* at 2358–59 ("Given the ubiquity of computers, wholly generic computer implementation is not generally the sort of 'additional featur[e]' that provides any 'practical assurance that the process is more than a drafting effort designed to monopolize the [abstract idea] itself.'") (quoting *Mayo*, 132 S. Ct. at 1297). Indeed, the Federal Circuit has made clear that even combining two or more different pieces of standard computer technology is not sufficient to render a claim patentable. *See, e.g.*, *In re TLI Commc'ns LLC Patent Litig.*, 823 F.3d 607, 612–13 (Fed. Cir. 2016); *Content Extraction & Transmission LLC v. Wells Fargo Bank, N.A.*, 776 F.3d 1343, 1347–48 (Fed. Cir. 2014).

2. The Claims of the '818 Patent Are Directed to Abstract Ideas.

The '818 patent is directed to wirelessly transmitting game-playing signals and user information, including the user's age, from a video game controller to a processor. Claim 20 reads:

> 20. A game apparatus comprising:
>
> [a] a wireless transmitter to transmit both an identification code and game control signals to a processor executing a game, the identification code is used by the processor to retrieve identification data and authorize game play based at least in part of an age of a player; and
>
> [b] a plurality of input controls to allow the player to interact with the processor to play the game.

'818 patent at Claim 20. This claims nothing more than the abstract idea of wirelessly authorizing access to a game based on age. To the extent that the claim includes tangible components, these components are nothing more than standard, off-the-shelf computer technology.

As many courts have found, the concept of authorizing access based on age, or any other criteria, is plainly abstract. *See, e.g.*, *OpenTV, Inc. v. Apple Inc.*, No. 5:15-cv-02008-EJD, 2016 WL 344845, at *7 (N.D. Cal. Jan. 28, 2016) ("[T]he concept of renewing access to products (i.e. pay per view events) using a generic computer based on user information stored in the computer is akin to a human operator accessing the information in a filing cabinet and referring to this information prior to renewing a user's membership."); *Jericho Sys. Corp. v. Axiomatics, Inc.*, No. 3:14-CV-2281-K, 2015 WL 2165931, at *3–*6 (N.D. Tex. May 7, 2015) (analogizing computer-based conditional access rules to "making a determination if somebody is old enough to buy an R rated movie ticket"), *aff'd per curiam*, 642 F. App'x 979 (Fed. Cir. 2016). In opposition to Big Fish's motion, Plaintiff did not contest that the idea of restricting access based on age is abstract. Big Fish Opp'n at 5–7.

Further, providing such authorization wirelessly is similarly abstract. Neither the claims nor the specification place any tangible limitations on ***how*** the data is to be transmitted wirelessly, instead stating that "***any*** low voltage transmitter" may be used, and that "[s]everal [unspecified] different methods of transmitting controller information from the wireless controller to the CPU are contemplated." '818 patent at 3:25–26; *id.* at 4:20–22; *see also id.* at 4:39–41. Both the Supreme Court and the Federal Circuit have repeatedly rejected attempts to overcome a determination that a claim is directed to an abstract idea by pointing to generic computer technology. *See, e.g.*, *Content Extraction*, 776 F.3d at 1347–48 (claims reciting a generic "scanner" are nevertheless abstract); *TLI*, 823 F.3d at 611–13 (claims reciting various hardware components, including a "telephone unit," a "digital pickup unit," and a "server" are nevertheless abstract). "[N]ot every claim that recites concrete, tangible components escapes the reach of the abstract-idea inquiry." *TLI*, 823 F.3d at 611.

The Federal Circuit's recent decision in *TLI* is instructive.[1] There, the patent at issue was directed to assigning classification data, such as a date or timestamp, to digital images using a telephone and sending those images to a server. The server then extracts the classification data and stores the digital images, taking into consideration the classification information. *TLI*, 823 F.3d at 610. Specifically, the panel considered the following representative claim:

> 17. A method for recording and administering digital images, comprising the steps of:
>
> recording images using a digital pick up unit in a telephone unit,
>
> storing the images recorded by the digital pick up unit in a digital form as digital images,
>
> transmitting data including at least the digital images and classification information to a server, wherein said classification information is prescribable by a user of the telephone unit for allocation to the digital images,
>
> receiving the data by the server,
>
> extracting classification information which characterizes the digital images from the received data, and

---

[1] Consistent with *TLI*, the Federal Circuit has repeatedly reaffirmed the distinction between claims that recite ***specific*** means or methods for reaching a desired result and entirely ***generic*** means or methods. *See, e.g.*, *McRO, Inc. v. Bandai Namco Games Am., Inc.*, 837 F.3d 1299, 1314 (Fed. Cir. 2016) ("We . . . look to whether the claims in these patents focus on a specific means or method that improves the relevant technology or are instead directed to a result or effect that itself is the abstract idea and merely invoke generic processes and machinery."); *Affinity Labs of Tex., LLC v. DirecTV, LLC*, 838 F.3d 1253, 1258 (Fed. Cir. 2016) (claims ineligible where directed to a "broad and familiar concept . . . untethered to any specific or concrete way of implementing it").

> storing the digital images in the server, and said step of storing taking into consideration the classification information.

Id. The *TLI* panel noted that while this claim "requires concrete, tangible components such as 'a telephone unit' and a 'server,' the specification makes clear that the recited physical components merely provide a generic environment in which to carry out the abstract idea of classifying and storing digital images in an organized manner." *Id.* at 611. The claims at issue were not directed to an improvement to computer functionality, but rather "to the use of conventional or generic technology in a nascent but well-known environment, without any claim that the invention reflects an inventive solution to any problem presented by combining the two." *Id.* at 612.

Just as in the *TLI* case, the purported invention here is not directed to improving computer functionality, but instead to combining generic components that operate in an expected manner. The specification does not describe a new wireless transmitter or receiver, a new device for storing data, or a new game processor. The specification fails to provide any technical details for the claimed tangible components, and instead relies on purely functional descriptions and references to conventional components. *Accord id.* As stated in the specification, the technology involved in wirelessly transmitting the data is both generic and conventional: "It will be appreciated by those skilled in the art that ***any*** low voltage transmitter is contemplated for use in the controller." '818 patent at 3:24–26 (emphasis added). Similarly, the storage component in the game controller is described in purely conventional terms, with a recitation of a non-exclusive list of common non-volatile memory types. *Id.* at 3:29–32. And the game processor is described simply in terms of performing generic computer functions such as storing data, receiving data, analyzing data, and retrieving data. *See, e.g.¸ id.* at 3:49–51 ("The central processing unit 122 can also contain a memory device 136 which stores data corresponding to the controllers."); *id.* at 3:8–10 ("The central processing unit includes at least one receiver circuit (RX) 130 for receiving signals from the wireless controller."); *id.* at 3:54–56 ("The CPU then analyzes the identification code using control 138 and retrieves data stored in the CPU memory 136 which corresponds to the identification code."). As in *TLI*, the functions of the game processor of the '818 patent are described with nothing more than "vague terms without any meaningful limitations." *TLI*, 823 F.3d at 612–13.

Plaintiff's infringement theory further confirms that the '818 patent is directed to nothing more than the abstract concepts of authorizing access to a game based on age and wirelessly transmitting data. ***First***, Plaintiff alleges that Zynga Poker meets the age authorization limitation of each of the asserted claims by posting Rules and Terms of Service on their website, which state that no one under the age of 13 years is allowed to create an account. ECF No. 64-3 at 23. This is akin to a bar posting a sign stating that no one under the age of 21 may order alcohol. It does not even require that the bartender verify the patron's age by, for example, checking their identification. Communicating rules regarding who may or may not participate in an activity is a basic human action practiced throughout history. *See, e.g.*, *Content Extraction*, 776 F.3d at 1347 (claims drawn to "undisputedly well-known" concepts that "humans have always performed" are abstract). ***Second***, Plaintiff claims that Zynga Poker meets the limitation of "transmitting data from a controller using wireless transmissions" because the end-user's mobile device (here, apparently, the "controller") is capable of wireless communication. Any claim construction that would permit such an expansive reading of the claimed wireless transmissions would envelop ***any*** wireless-enabled computing device without limitation. Such broad and generic claim terms are necessarily abstract.

3. The Claims of the '818 Patent Do Not Contain Any Additional Elements That Would Transform the Claims Into Patentable Subject Matter.

The second step of the *Alice* framework requires the Court to search for an inventive concept that is "sufficient to ensure that the patent in practice amounts to significantly more than a patent upon the [ineligible concept] itself." *Alice*, 134 S. Ct. at 2355. Here, there can be no genuine dispute that the asserted claims are lacking any inventive concept.

a. The Only Hardware Described Is in Purely Functional and Generic Terms.

The Supreme Court has explicitly warned that "the prohibition against patenting abstract ideas cannot be circumvented by attempting to limit the use of [the idea] to a particular technological environment," and, for this reason, "the mere recitation of a generic computer cannot transform a patent-ineligible abstract idea into a patent-eligible invention." *Alice*, 134 S. Ct. at 2358. Indeed, "[g]iven the ubiquity of computers . . . [a] wholly generic computer implementation is not generally the sort of 'additional feature' that provides any 'practical assurance that the process is more than a drafting effort designed to monopolize the abstract idea itself.'" *Id*. Thus, "if a patent's recitation of a computer amounts to a mere instruction to 'implemen[t]' an abstract idea 'on . . . a computer,' that addition cannot impart patent eligibility." *Id.* (quoting *Mayo*, 132 S. Ct. at 1301). Applying this standard, the challenged claims rely purely on standard, well-known computer technology, and thus ultimately amount to nothing more than claims to implement the abstract idea with generic and conventional components.

As the Court noted, the claims of the '818 patent require a controller capable of wireless transmissions, and the specification states that game controllers at the time of the invention were not wireless. Big Fish Order at *10–*11. But this does not end the analysis under the second step of *Alice*. As discussed above, the specification itself describes both a game controller and a means for wirelessly transmitting data as conventional components. '818 patent at 2:53–54 ("A variety of controllers are known to those skilled in the art . . ."); *id.* at 3:3–5 ("Again, a controller of the present invention can include any known input device including electrical switches sensitive to human movements."); *id.* at 3:25–26 ("[A]ny low voltage transmitter is contemplated for use in the controller."). The specification does not identify any difficulty or problem with combining a conventional controller with a conventional wireless transmission device, nor does it detail how one would actually go about combining the two. Where the specification "limits its discussion of [known] components to abstract functional descriptions devoid of technical explanation as to how to implement the invention," those components and the combination of those components does not provide an inventive concept sufficient to transform the abstract idea into a patent-eligible invention. *TLI*, 832 F.3d at 614–15.

The only other structural element claimed in Claim 20, the "game processor," is nothing more than a general-purpose computer that performs the routine tasks of "executing" an interactive game and receiving the data sent by the controller. *See, e.g.*, '818 patent at 3:6–10, 3:49–51, 3:54–56. Neither the '818 patent claims nor the specification purport to improve the functioning of the processor.

In sum, the alleged invention of the '818 patent does not make any of the hardware components run faster or more efficiently. Instead, the claims are only directed at combining those preexisting components, each used for its conventional purpose, to achieve the overall purpose of the claim—its underlying abstract concept.

b. The Claims Risk Unduly Preempting Wireless Gameplay.

A patent on an abstract idea effectively preempts the idea itself, and attempts to claim ownership of inventions that a patentee never conceived of, and did not contribute to the state of the art by way of his patent application. *See Bilski v. Kappos*, 561 U.S. 593, 611–612 (2010); *Mayo*, 132 S. Ct. at 1294 (finding that, by covering a broad range of potential known and unknown uses of an abstract idea, a patent would preempt an entire field and "risk disproportionately tying up" the use of the abstract idea). For that reason, *Alice* cautioned courts to "distinguish between patents that claim the 'buildin[g] block[s]' of human ingenuity and those that integrate the building blocks into something more." *Alice*, 134 S. Ct. at 2354. "The former 'would risk disproportionately tying up the use of the underlying' ideas, and are therefore ineligible for patent protection. The latter pose no comparable risk of pre-emption, and therefore remain eligible for the monopoly granted under our patent laws." *Id.* at 2354–55.

Here, the claims risk potentially preempting the basic concept of playing a video game using a wireless device. Indeed, Plaintiff's infringement theory renders these claims so broad that they encompass ***any*** device capable of transmitting game data wirelessly, so long as there is a stated policy of restricting access based on age. Such broad claims jeopardize future innovation disproportionately "relative to the contribution of the inventor." *Mayo*, 132 S. Ct. at 1303.

4. All of the Asserted Claims of the '818 Patent Rise and Fall Together.

The eligibility analysis looks at the claimed invention as a whole and does not turn on the form in which claims are drafted. *See Alice*, 134 S. Ct. at 2360. For this reason, the Section 101 analysis can be performed through representative claims, without a repetitive consideration of the bells and whistles, or minor differences in form, added by the other claims. *See, e.g.*, Big Fish Order at *4; *Content Extraction*, 776 F.3d at 1348 (citation omitted); *TLI*, 87 F. Supp. 3d at 785–86 ("[W]here, as here, all of the claims are directed to the same abstract idea, the Federal Circuit teaches that addressing each claim of the asserted patents is unnecessary.").

The other asserted claims (Claims 1, 16, 21, 24, 31, and 32)[2] are directed to the same abstract ideas of authorizing access to a game based on age and wirelessly transmitting data found in Claim 20, and simply use a different claim format or add additional conventional hardware components. For example, in opposition to Big Fish's Motion to Dismiss, Plaintiff argued that the Court should "focus its inquiry on" Claim 1, and that Claim 1 recites an inventive concept because a "personalized portable control" was "unknown in the field of the art." Big Fish Opp'n at 7. But the ***only*** component that Plaintiff argued distinguished the claimed controller from the prior art was a "transmitter for wireless transmitting." *Id.* Plaintiff noticeably did not argue that such a wireless transmitter was not a conventional computer component, nor could they. As discussed above, simply combining conventional computer components (e.g., a game controller and a wireless transmitter), to perform in expected ways (e.g., a game controller that can transmit data wirelessly), cannot transform an abstract idea into patentable subject matter. Just as combining a scanner with data processing technology did not render the claims in *Content Extraction* patent eligible, and just as combining a telephone with a server capable of classifying data did not render the claims in *TLI* patent eligible, combining a wireless receiver with a game controller does not render the claims of the '818 patent eligible.

Similarly, Claims 16 and 24 merely reorder the generic components of Claim 20, including a game processor, a game controller, and a wireless transmitter. Claims 31 and 32 add nothing more than describing the game controller as a "hand-held device" or a "portable communication device." Finally, Claim 21 is perhaps the broadest of all the asserted claims, mimicking the limitations of Claim 20, but in the form of a method claim. These conventional computer components are insufficient to transform the underlying abstract concepts into patentable subject matter.

B. Plaintiff's Direct Infringement Allegations Fail to State a Claim for Relief.

On December 1, 2015, the Supreme Court abolished Form 18 pleading by amending the Federal

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[2] As these are the only asserted claims, both in Plaintiff's Infringement Contentions served on July 27, 2016, and in Plaintiff's FAC, the Court need not address the remaining claims before dismissing Plaintiff's claims based on the '818 patent. But even were the Court to address the remaining claims, the analysis would not change. Each of the claims is directed to the same basic underlying concept of authorizing access to a game based on age implemented on generic hardware.

Rules of Civil Procedure to abrogate the form, making clear that a patent plaintiff must follow the mandates of *Iqbal* and *Twombly* if it hoped to survive dismissal. Under this new standard, a complaint for patent infringement must allege more than that a particular product's operation is "consistent with" or renders "possib[le]" infringement. Instead, it must contain "some further factual enhancement" or an additional "factually suggestive" allegation that direct infringement is "plausible." *Twombly*, 550 U.S. at 556–57 & 557 n.5. Complying with this new standard means actually showing, in a sworn complaint submitted to the court, how the accused system might plausibly meet each claim limitation. As a recent decision on the issue explains: "factual allegations that do not permit a court to infer that the accused product infringes each element of at least one claim are not suggestive of infringement—they are merely compatible with infringement." *Atlas IP, LLC v. Exelon Corp.*, No. 15 C 10746, 2016 WL 2866134, at *5 (N.D. Ill. May 17, 2016). "Because the failure to practice even a single element is all that separates innovation from infringement, there is always an obvious alternative explanation where a plaintiff does not allege facts about each element." *Id.*

In granting Zynga's Motion to Dismiss, the Court provided Plaintiff the opportunity to amend in order to correct the specific deficiencies identified in the Court's Order. Plaintiff has failed to do so.

Claim 20 requires that the "processor executing a game" use an "identification code" to "authorize game play based at least in part on an age of a player." '818 patent 7:26–30. Thus, Claim 20 does not cover ***all*** forms of age-based gameplay authorization, but, instead, specifically requires that such authorization be performed: (1) by a specific processor (the "processor executing a game"); and (2) through use of an "identification code." *Id.* Plaintiff's sole factual allegation for this limitation is its assertion that a "user must confirm they are at least 13 years of age to create and register an account with Zynga by agreeing to Zynga's Terms of Service." FAC ¶ 34. Along with this allegation, Plaintiff includes a screenshot of Zynga's Terms of Service from a static webpage available on Zynga.com, which states "You may **not** use our Service if . . . **You are under 13 years of age**, in which case you must not create an Account, use any part of the Service, or submit personal information through the Service or to Zynga . . . ." *See id.* Far from supporting an inference that Zynga (or its customers) infringe this limitation, Plaintiff's allegation and screenshot support only an inference of ***no*** infringement.

At the outset, Plaintiff's allegations do not support an inference that ***any*** processor (much less the specific processor that is executing any particular Zynga game) "authorize[s] game play based at least in part on an age of a player." ECF No. 64-3 at 23. Indeed, rather than point to any age-based authorization performed by a ***processor***, Plaintiff points only to a ***legal*** prohibition in a contract that, according to Plaintiff's own allegations, is enforced by a prospective ***user***, rather than any Zynga "processor executing a game." *Id.* In short, Plaintiff's allegation that ***users*** self-police the age-limitations found in a Terms of Service cannot support the inference that the claimed "processor executing a game . . . authorize[s] game play based at least in part on an age of a player," as Claim 20 requires. To the contrary, it supports only the inference that a human—and not any processor—enforces age-based restrictions.

Moreover, the age-based authorization of Claim 20 must be performed using an "identification code." '818 patent at 7:26–27. Plaintiff pleads no facts supporting an inference that any "identification code" is used to "authorize game play based at least in part on an age of a player." *See* FAC ¶¶ 33–34. This alone warrants dismissal. *Atlas IP LLC v. Pac. Gas & Elec. Co.* ("*PG&E*"), No. 15-cv-05469-EDL, 2016 WL 1719545, at *4 (N.D. Cal. Mar. 9, 2016) ("Because the complaint entirely fails to address [a] necessary element of claim 1, the claim fails as pled."). Significantly, Plaintiff's own allegations are inconsistent with the requirement that an "identification code" be used for age-based gameplay authorization. The only element of Zynga's games that Plaintiff points to as satisfying Claim 20's "identification code" limitation is "login information" associated with a user's Zynga account. *See* FAC ¶ 33. Yet, if, as Plaintiff contends, the age-gating of Zynga's games occurs when users follow the age restrictions of Zynga's Terms of Service, that user-imposed age-gating necessarily cannot involve the use of an "identification code" (i.e., login information associated with a user's Zynga account). That is because the user's self-policing of the age restriction in the Terms of Service is a ***precondition*** to: (1) the creation of an account; or (2) the submission of any personal data to Zynga. *See* FAC ¶ 34 ("You may **not** use our Service if . . . **You are under 13 years of age**, in which case you must not create an Account . . . or submit personal information through the Service or to Zynga."). Accordingly, a user who heeds the age restriction will neither create the "login information" that Plaintiff contends satisfies the "identification code" limitation, nor will she send personal information (such as her age) to Zynga. Thus, under Plaintiff's own theory of infringement, the user's enforcement of the age restriction necessarily cannot involve the use of an "identification code."

Because the FAC once again fails entirely to support these conclusory allegations with plausible factual support, they each form an independent basis to dismiss the FAC in its entirety. *PG&E*, 2016 WL 1719545, at *4 ("Because the complaint entirely fails to address [a] necessary element of claim 1, the claim fails as pled"); *Exelon*, 2016 WL 2866134, at *5 ("[F]actual allegations that do not permit a court to infer that the accused product infringes each element of at least one claim are not suggestive of infringement—they are merely compatible with infringement" and thus fail to state a claim).

C. Plaintiff's Indirect Infringement Allegations Fail to State a Claim for Relief.

"It is axiomatic that "[t]here can be no inducement or contributory infringement without an underlying act of direct infringement." *In re Bill of Lading Transmission & Processing Sys. Patent Litig.*, 681 F.3d 1323, 1333 (Fed. Cir. 2012). As explained above, Plaintiff failed to plead plausible allegations of direct infringement. For this reason alone, the Court should dismiss the induced and contributory infringement allegations with respect to the '818 patent with prejudice.

Additionally, liability for induced infringement "requires that the alleged infringer knowingly induced infringement and possessed specific intent to encourage another's infringement." *Id.* Thus, to survive a motion to dismiss, Plaintiff was required to plead facts supporting an inference that Zynga: (1) "intended to induce its customers to use its products to practice the patented method," *id.*, and (2) "knew that any acts [it] purportedly induced constituted patent infringement," *CAP Co. v. McAfee, Inc.*, No. 14-cv-05068-JD, 2015 WL 3945875, at *5 (N.D. Cal. June 26, 2015). Plaintiff's allegations fall far short of both of these requirements.

Indeed, rather than plead any facts supporting an inference that Zynga intended its customers to practice any claims of the '818 patent, Plaintiff alleges only that Zynga has: (1) provided unidentified "instructions to its customers"; and (2) touted and advertised unidentified "features of its social casino games to its customers." *See* FAC ¶ 24. Plaintiff does not allege that Zynga instructed its users to perform steps that would infringe any claims of the '818 patent, nor do they allege that Zynga "advertised benefits that can be achieved only through use of the asserted patent." *CAP*, 2015 WL 3945875, at *5. It is well-established that such generic references to "instructions," "touting and advertising"—"without ever saying what those materials contain"—is "wholly inadequate for an inference of specific intent." *Id.*; *see also Unisone Strategic IP, Inc. v. Life Techs. Corp.*, No. 13-cv-

1278, 2013 WL 5729487, at *3 (S.D. Cal. Oct. 22, 2013) (finding insufficient allegation that defendant "intentionally designs, manufactures, markets, promotes, sells, services, supports (including technical support), provides updated software, and educates its customers and suppliers about its [ ] software"); *Intellectual Ventures I LLC v. Bank of Am., Corp.*, No. 13-cv-358, 2014 WL 868713, at *2 (W.D.N.C. Mar. 5, 2014) (finding allegations insufficient where plaintiffs "merely argued that [d]efendants advertised the[ir] accused products on its website"); *Memory Integrity, LLC v. Intel Corp.*, 144 F. Supp. 3d 1185, 1197 (D. Or. 2015) (finding allegations insufficient where defendant did not instruct customers to use the products in an infringing manner).

If Plaintiff will once again argue, on the one hand, that its patent is valid because it contains "an arrangement of particularized computer components," it cannot, on the other, ignore its obligation to provide allegations supporting that Zynga instructed its users to perform the steps or utilize the apparatus that infringe(s) that particular arrangement of hardware components. This is important, as Zynga is a software company—specifically selling application software for its users to play its games—so Zynga is agnostic as to the hardware (much less the hardware arrangement) its users use to play its games, and nothing in the FAC is to the contrary.

Plaintiff likewise fails to "plead facts that give rise to a plausible inference that defendants knew that any acts they purportedly induced constituted patent infringement." *CAP*, 2015 WL 3945875, at *5. Indeed, the "complaint contains no facts at all describing what ***acts*** [Zynga] allegedly induced and what defendants ***knew*** about those acts." *Id.* (emphases added). Plaintiff's inducement claims should therefore be dismissed for this additional reason. *See id.*

D. Plaintiff's Willful Infringement Allegations Fail to State a Claim for Relief.

As the Court discussed in its Order granting Big Fish's Motion to Dismiss, the standard for pleading willful infringement is set out by the Supreme Court in *Halo Electronics, Inc. v. Pulse Electronics, Inc.*, 136 S. Ct. 1923 (2016). While emphasizing the district court's discretion in awarding enhanced damages in patent cases, the Court held that an award of such damages is limited "to egregious cases of misconduct beyond typical infringement." *Id.* at 1935.

As with Plaintiff's now-dismissed willful infringement claims against Big Fish, Plaintiff has failed to state a claim for willful infringement against Zynga because it fails to allege any facts suggesting that Zynga's conduct is "egregious . . . beyond typical infringement." *Id.* Indeed, Plaintiff's claims for willful infringement here are ***identical*** to the claims the Court already dismissed directed at Big Fish. Plaintiff merely states that Zynga was made aware of the '818 patent, and that its alleged continued infringement "constitutes willful and egregious infringement behavior." Plaintiff simply fails to allege ***any*** facts to support this legal conclusion.

Once again, despite clear direction from the Court, Plaintiff has failed to cure its complaint of fatal deficiencies. Zynga requests the Court dismiss Plaintiff's willful infringement contentions with prejudice.

III. CONCLUSION

For the foregoing reasons, the claims of the '818 patent should be found invalid as abstract, and Plaintiff's First Amended Complaint should be dismissed in its entirety *with prejudice*.

Dated: December 1, 2016

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By: */s/ Sonali D. Maitra*

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CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2016 the within document was filed with the Clerk of the Court using CM/ECF which will send notification of such filing to the attorneys of record in this case.

/s/ Sonali D. Maitra
SONALI D. MAITRA